STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
(Borello, P.J., and Whitbeck and K. F. Kelly, JJ.)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

BOBAN TEMELKOSKI,

Defendant-Appellant.

Supreme Court No. 150643
Court of Appeals No. 313670
Wayne Cir. Ct. No. 94-000424-FH

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BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are 32 law professors who specialize in constitutional law, substantive criminal law, criminal procedure, and/or the legal treatment of persons with criminal records. As law professors, *amici* have an interest in helping the Court to ensure that the Ex Post Facto Clause of Article I of the United States Constitution is enforced in a manner consistent with its core goals and principles. A full list of amici is attached as Appendix A.

SUMMARY OF ARGUMENT

Michigan has retroactively placed punitive and highly burdensome restrictions on those convicted of sex offenses, including extensive requirements to appear frequently in person at police departments, as well as restrictions on their movement, residency, and place of work. These restrictions stem automatically from their convictions, with no individualized determinations. These regulations are different in degree and in kind from provisions previously upheld by the Supreme Court of the United States. They are far more burdensome, and are punitive rather than regulatory in their effect. Consistently with the Sixth Circuit's recent holding in *Does v Snyder*, ___ F3d ___ (CA 6, 2016) (Docket No. 15-1546), this Court should find that Michigan's retrospective application of these restrictions violates the Ex Post Facto Clause of Article I, Section 10 of the Constitution.

This brief proceeds in two parts. First, reasoning from historical and doctrinal background, we show that Michigan's retroactive restrictions on sex offenders implicate

[1] No party's counsel authored this brief, nor did any party or party's counsel or any person other than amici contribute money for the preparation and submission of this brief.

the Ex Post Facto Clauses' core purposes. The Clauses were adopted against a background of rampant retrospective legislation, and the Framers viewed such legislation as a serious threat to fundamental liberties. Retrospective punishment presents a high risk of vindictive and abusive legislation that indulges the political passions of the moment, at the expense of a socially disfavored class. Moreover, it runs afoul of individuals' fundamental right to notice of the criminal laws governing their conduct. Michigan's retroactive application of burdensome restrictions on sex offenders entail precisely the sort of targeting of socially undesirable persons that the Framers were so concerned about.

Criminal law in general targets socially undesirable *conduct*, and to that end, Michigan certainly has the power to craft strong prospective criminal prohibitions and punishments of sex offenses. But the prospective character of criminal law is a crucial constraint on its abuse; it means that it does not target defined existing individuals or classes of persons. Rather, it gives every individual the chance to conform his or her conduct with the law, with notice of the consequences of failing to comply. The Ex Post Facto Clauses are a crucial bulwark of individual liberty and a protection against the abuse of government power. Antipathy toward or fear of a given group of individuals—even to the extent that it is justified by their past conduct—cannot justify sacrificing this core feature of the rule of law.

Second, we address the core doctrinal question in the case: are the challenged restrictions "punishment"? We conclude that it is. We address this question by proceeding straightforwardly through five key factors identified by the Supreme Court in

Kennedy v Mendoza-Martinez, 372 US 144, 169; 83 S Ct 554, 568; 9 L Ed 2d 644 (1963), and applied to sex offender registration in *Smith v Doe*, 538 US 84, 100; 123 S Ct 1140, 1151; 155 L Ed 2d 164 (2003), which we distinguish.

As the Sixth Circuit recognized in *Does*, the restrictions at issue here are so much more burdensome than those upheld in prior cases that they should be seen as different in kind; this is no longer merely a "registration" case. They include frequent in-person appearances at police departments as well as the public dissemination of facts that go well beyond already-public criminal records. Moreover, registration also triggers extreme restrictions on freedom of movement—geographic exclusion zones that apply to work, residence, and "loitering." These restrictions place huge swaths of Michigan off-limits to registrants, and because the zones' borders are in practice unknown to registrants, they effectively chill an even broader range of lawful conduct.

With these distinctions in mind, application of the *Mendoza-Martinez* factors leads to the conclusion that the Michigan restrictions are clearly punitive in effect. First, the restrictions are closely analogous to traditional punishments, including modern probation and parole (which in fact are typically far less onerous) and the historical practice of banishment. Second, the restrictions impose affirmative disabilities or restraints—quite severe ones, as already described. Third, the restrictions serve traditional purposes of punishment, including retribution, general deterrence, incapacitation, and specific deterrence. Fourth, while the restrictions seek to advance the state's regulatory interest in protecting the public from sex offenses, the best empirical evidence indicates that they have in practice had the opposite effect. That empirical evidence was not yet available

when the Court decided *Smith*, and informs the question whether the *effect* of the law (and not just its intent) is better characterized as punitive or regulatory. Finally, the restrictions are excessive with respect to their regulatory purpose. They are not tailored to individuals' risk, which the Supreme Court has indicated is necessary if a law is (like this one) sufficiently burdensome. Moreover, some of the restrictions are simply gratuitous and do not have any apparent connection to public safety.

I. ARGUMENT

A. Michigan's Retroactive Restrictions on Sex Offenders Implicate Core Purposes of the Ex Post Facto Clause.

The Framers' inclusion of the Ex Post Facto Clauses in the United States Constitution, US Const, art I, § 10, cl 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility"); US Const, art I, § 9, cl 3 (likewise restricting federal legislation), reflected their profound concern for the threat to human liberty posed by retroactive criminal laws. The founding generation viewed the Clauses as a critical substantive protection against vindictive legislatures and safeguard against tyranny. *See* Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am Crim L Rev 1261, 1267 (1998). The challenged Michigan sex offender restrictions are of a piece with the types of legislation the Ex Post Facto Clauses were designed to preclude.

The Framers' aversion to ex post facto laws was informed by experience. A review of the period between independence and the ratification of the Constitution reveals that state legislatures enacted countless abusive retrospective statutes, including

bills of attainder, statutes confiscating property, and statutes setting aside court judgments. Zoldan, *Reviving Legislative Generality*, 98 Marquette L Rev 625, 679 (2014). But by the time of the framing of the Constitution, the national mood had shifted considerably. Zoldan, *The Civil Ex Post Facto Clause*, 2015 Wisc L Rev 727, 768-69 (2015). A number of states prohibited ex post facto laws in their state constitutions, declaring them "oppressive, unjust, and incompatible with liberty." Md Const of 1776, A Declaration of Rights, art 15; NC Const of 1776, A Declaration of Rights, art 24; *see also Place v Lyon*, 1 Kirby 404, 405 (Conn 1788) (holding that ex post facto laws violate a "fundamental principle of justice"). During debates over the language of the Constitution, James Wilson and Oliver Ellsworth, both future Supreme Court Justices, argued that ex post facto laws are so odious that they are void even without a specific prohibition in the Constitution's text. Farrand, ed, *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1911), p 376. James Madison likewise deemed them "contrary to the first principles of the social compact and to every principle of sound legislation." *The Federalist No. 44*, at 287 (James Madison) (Isaac Kramnick ed. 1987).

The Supreme Court has likewise recognized that the Ex Post Facto Clause serves several intertwined purposes: it protects socially disfavored groups from vindictive legislation, it preserves the separation of powers (wherein the legislature defines the law prospectively, while the judiciary subsequently applies that law to conduct after it has occurred), and it protects the core individual right to notice of criminal prohibitions and punishments. *Weaver v Graham*, 450 US 24, 28-29; 101 S Ct 960; 67 L Ed 2d 17 (1981).

The principle of *nulla poena sine lege* is a fundamental feature of the rule of law that constrains every civilized system of government, including ours.

Laws that failed to provide adequate notice were routinely condemned on the eve of the Constitution's framing. The Vermont Council of Censors summed up the national mood when it criticized its legislature for creating an environment in which citizens "scarce know what is law, or how to regulate their conduct." Address of the Council of Censors (Feb 14, 1786), in *Records of the Council of Censors of the State of Vermont* 67 (Gillies & Sanford eds. 1991). Among the most reviled of retrospective laws enacted during the period preceding the Constitution were statutes used to target political or social undesirables. For example, state legislatures enacted statutes confiscating property from, banishing, and in some cases condemning to death, citizens suspected of harboring heterodox political views. Chaffee, *Three Human Rights in the Constitution of 1787* (Lawrence, Kansas: University of Kansas Press, 1956), p 93. The legislature punished some of these individuals because they were believed to present a danger to the community, Trent, *The Case of Josiah Philips,* 1 AM HIST REV 444, 454 (1896), and others merely because they offended the sensibilities of the politically powerful, Wood, *The Creation of the American Republic,* 1776-1787 (Chapel Hill: University of North Carolina Press, 1969), p 367. In rejecting ex post facto laws, the framers affirmed their commitment to eradicating retrospective legislation that targeted politically vulnerable groups or individuals that ran afoul of the majority will. *See, e.g.*, Wilson, Hall & Hall, eds, *Considerations on the Bank of North America 1785, in* 1 *Collected Works of James Wilson*, (Indianapolis: Liberty Fund Inc, 2007), pp 60, 71.

Thus, as Chief Justice Marshall observed in *Fletcher v Peck*, a core reason for the Ex Post Facto Clauses was to bar legislatures from enacting retroactive punishments when they were caught up in the "feelings of the moment" and subject to "sudden and strong passions" toward a particular population. *Fletcher v Peck*, 10 US (6 Cranch) 87, 137-38; 3 L Ed 162 (1810). This point was reiterated in *Cummings v Missouri*, 71 US (4 Wall) 277; 18 L Ed 356 (1866), which struck down as a violation of the Ex Post Facto Clause a loyalty oath law that required affirmations concerning past conduct, which had the effect of retrospectively excluding past Confederate sympathizers from certain offices. The Court recognized that the public's outcry against Confederate sympathizers, while understandable in the Civil War's wake, was no justification for abridging one of the most important protections of liberty in the Constitution. *Id.* at 316-17.

To be sure, criminal laws routinely reflect community sensibilities, including anger and fear; criminalization is properly meant to condemn and punish conduct that society deems unacceptable. But the prospective character of criminal law is a crucial check on abuses of this function, by preventing entire classes of people from being suddenly subjected to harsh treatment. In effect, prospective criminal laws act slowly; they do not impose punishment on any individual right away. Rather they apply only after each individual has had the opportunity to learn of the law and the punishments it imposes, and has chosen to violate it anyway. Moreover, prospective criminal laws do not target any existing group or individual for punishment; they bar future *actions*, and attach punishment to them, such that every individual in society may decide (through his future conduct) whether to subject himself to those punishments.

The passions of the moment may thus routinely be reflected in legislation that binds future individuals, until and unless those passions fade and the legislation changes. But the Ex Post Facto Clause prevents the legislature from engaging in more sweeping legislation, targeting whole already-existing groups on the basis of *past* conduct, with a broad and sudden punitive effect. It likewise protects every individual from being subjected to punishments that he had no reason to anticipate at the time of his actions. The Clause thus acts, in James Madison's words, as a "constitutional bulwark" against instances of impassioned legislative overreach. *See The Federalist, supra*.

Michigan's retroactive application of its recent sex offender regulations is a perfect example of exactly this sort of overreach. There can be no doubt that sex offenders today are a disdained population—the target of severe social opprobrium and numerous innovative punishments and regulations. *See* Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America* (Stanford: Stanford University Press, 2009), pp 85-108; Carpenter, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L J 1071, 1073-74 (2012). Michigan has targeted this population with sweeping restrictions, triggered automatically by their convictions, no matter how long ago those convictions took place. The restrictions, as applied to plaintiffs and others whose offenses predate their adoption, are plainly retroactive. At the time of their offenses, plaintiffs had no notice that they would be subject to them.

Certainly, legislatures are free to respond to the public demand to condemn and punish those who commit sex offenses. Michigan and other states have many

constitutionally permissible tools at their disposal for such a response. They are, in particular, free to heighten the severity of punishments for sex crimes. But the Ex Post Facto Clause requires that such punishments be applied only prospectively.

B. The Challenged Restrictions Are Much More Burdensome than Previously Upheld Sex Offender Registration Requirements, and Are Punishment.

The Supreme Court has interpreted the Ex Post Facto Clauses to apply to retrospective *punishment*, *see, e.g.*, *Calder v Bull*, 3 US (3 Dall) 386; 1 L Ed 648 (1798) so the key question for this Court is whether the Michigan sex offender restrictions are punishment. The Supreme Court has held that legislation is punishment if it is punitive in intent *or* in effect. *Smith v Doe*, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003); *Kansas v Hendricks*, 521 US 346, 361; 117 S Ct 2072; 138 L Ed 2d 501 (1997). Because decisions such as the Court's in *Smith* have established a strong norm of deference to legislatures concerning their intents, the critical question for courts most often concerns whether the effects of challenged statutes are punitive. *See, e.g.*, *Smith*, 538 US at 92.

A review of Michigan's statutory requirements, MCL 28.721 *et seq.*, as well as the effects of their application, dictates the conclusion that the restrictions are punitive. To determine if a law is punitive in its effects, the Supreme Court created the seven-factor test outlined in *Kennedy v Mendoza-Martinez*, 372 US 144, 168–69 83 S Ct 554; 9 L Ed 2d 644 (1963). The *Mendoza-Martinez* factors are "neither exhaustive nor dispositive," but are a useful means of determining whether the effects of a statute are punitive. *Smith*, 538 U.S. at 97. In *Smith*, the Supreme Court deemed five of the factors to be most relevant as applied to sex offender registries—namely, whether the scheme "has been

regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Id*. Unlike in *Smith*, each of those factors strongly point toward a conclusion that the Michigan statute is punitive.

A primary question for this Court is whether *Smith*, which upheld an Alaska sex offender registration requirement, can be distinguished. It can and should be. The Alaska law is a first-generation registration requirement, imposing comparatively minor burdens: offenders did not need to register in person, faced only misdemeanor charges for failure to register, and remained free to work, reside, and travel wherever they wanted. *Smith*, 538 US at 101; *see* Alas Stat 12.63.010(b) (2000). The Michigan law is different in kind. Its requirements far exceed registration, including frequent in-person appearances and a sweeping restriction on residency, work, and movement: with only narrow statutory exceptions, registrants may not work, reside, or "loiter" within 1000 feet of a school. MCL 28.734 & 28.735. Violations trigger serious felony sanctions, and for many offenders the law stays in effect for life. *Smith* did not contemplate laws like this, and its reasoning implies that this law should be struck down.

1. The Michigan Restrictions on Residency and Movement Are Analogous to Traditional Punishments.

In *Smith*, addressing the first *Mendoza-Martinez* factor, the Supreme Court considered whether the Alaska registration requirement was analogous to historical punishments such as banishment and shaming penalties. As the Court explained:

> Some colonial punishments indeed were meant to inflict public disgrace. Humiliated offenders were required "to stand in public with signs cataloguing their offenses." … The aim was to make these offenders suffer "permanent stigmas, which in effect cast the person out of the community." The most serious offenders were banished, after which they could neither return to their original community nor, reputation tarnished, be admitted easily into a new one.

Smith, 538 US at 97-98. Actual, physical banishment was thus a maximally severe penalty in the colonial era; lesser (but still quite serious) punishments "*in effect* cast the person out of the community," by imposing stigma. *Id.* (emphasis added). Such actions were unquestionably considered "punishment" around the time of the founding, and would still be easily recognizable as punishment today. The Supreme Court, however, found that Alaska's registration requirement did not rise to this level. It did not resemble banishment; sex offenders remained free to live and work in their communities. And the state's Internet dissemination of records could not by itself count as punishment, because it amounted only to the further sharing of information (criminal records) that is already public record. The stigma, the Court held, flowed from the conviction itself.

The Michigan law is different. First, it is much more closely analogous to banishment. Indeed, it *is* banishment—not from the state in its entirety, but from a great many locations within it, including entire urban areas in which all locations are within 1000 feet of a school. *See, e.g.*, *Does v Snyder*, ___ F3d ___ (CA 6, 2016) (Docket No. 15-1536); slip op at 7-8 (displaying an illustrative map). Because working and "loitering" do not necessarily involve static locations, these restrictions are likely to effectively exclude registrants even from areas that they do not technically govern. As individuals travel, they cannot be expected to know at any given time where every nearby

school is, and must err on the side of caution to avoid serious criminal punishment. *See id.* And surely, those permanently excluded by law from core community functions that take place in and near schools are seriously stigmatized and effectively cast out as surely as one who was made to temporarily display a sign with her offense. Here, the effect flows not merely from the conviction itself, but from the prohibitions on movement, work, and residency as well, which mark the offender permanently as a literal outcast.

Second, Michigan's restrictions are also analogous to parole or probation supervision, which is clearly punishment, *see United States v Knights*, 534 US 112, 119; 122 S Ct 587; 151 L Ed 2d 497 (2001). Indeed, Michigan's restrictions are far *more* restrictive than ordinary parole or probation. In *Smith*, the Court took seriously the claim that registration requirements, even taken alone, were analogous to probation or supervised release, but ultimately rejected the argument because *solely* a reporting requirement was at issue, and not a direct restriction on liberty:

> This argument has some force, but, after due consideration, we reject it. Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. By contrast, offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision. Although registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so.

Smith, 538 US at 101. In Michigan, registrants are *not* "free to move where they wish and to live and work as other citizens"; their actions need not merely be reported, but are directly constrained. Moreover, they also are required to appear *in person* at police departments under a long list of circumstances (unlike under the Alaska law), and these

requirements for many registrants stay in effect for life—making them, again, like a supercharged, unending version of parole or probation.

Moreover, even apart from these direct restrictions, the Michigan law imposes public stigma that, unlike the Alaska law in *Smith*, does *not* merely amount to republishing information that was already public. The registration requirement is not restricted to those whose convictions are already public record. Indeed, Mr. Temelkoski himself was never convicted at all; his case was dismissed and the record sealed pursuant to the Holmes Youthful Trainee Act. Moreover, even for those who do have already-public convictions, the published information includes personal details that would not generally be part of a criminal case's public record, and brands each offender as a "sex offender" even though not every crime requiring registration is, in fact, sexual in nature, and (as in Mr. Temelkoski's case) not every registrant has been convicted at all.

2. The Michigan Statute Imposes An Affirmative Disability or Restraint

The second *Mendoza-Martinez* factor is whether the challenged regulation imposes an "affirmative disability or restraint." *Mendoza-Martinez,* 372 US at 168-69. The Michigan statute plainly does. It dramatically restricts where registered persons may live, work, and move. It imposes burdensome responsibilities, including frequent personal appearances at police stations. In addition, offenders must pay a registration fee and failure to pay this fee is a separate criminal offense. Finally, failing to register is a felony that potentially triggers a substantial prison penalty. All of these are disabilities or restraints directly imposed by the law itself; these are in addition to the indirect social and economic consequences of the increased public accessibility of the record.

In *Smith*, by contrast, the Court found that the Alaska registration requirement imposed little disability or restraint on offenders. This finding was critical, because "[i]f the disability or restraint imposed is minor and indirect, its effects are unlikely to be punitive." *Smith*, 538 US at 100. The *Smith* Court reached its conclusion for several reasons, none of which apply here.

First, the Court emphasized that the Alaska statute required only *calling* the police once a year or, in some cases, once a quarter. "The Alaska statute, on its face, does not require these updates to be made in person. And…the record contains no indication that an in-person appearance requirement has been imposed on any sex offender subject to the Act." *Id.* The Court noted that the lower court had factually erred in finding that the statute had in-person reporting requirements, but the Court's language strongly suggests that if such requirements *had* existed, they would have constituted affirmative disabilities and restraints. *Id*. Here, in contrast, Michigan requires regular in-person visits (ranging from yearly to quarterly, depending on the tier of the offense), and also requires the registrant to visit in person "immediately" upon changing domicile or employment, enrolling or withdrawing from an educational institution, changing a name, establishing an email address "or any other designations used in internet communications or postings," such as a social media account or an account with any online forum, traveling anywhere for seven days or more, buying or beginning to regularly operate any vehicle or discontinuing ownership or operation. MCL 28.725.

Second, the Alaska law did not otherwise directly restrict registrants' freedoms; the Court emphasized that they remained free to change jobs and residences with no

restrictions other than needing to inform the police. *Smith*, 538 US at 101. In Michigan, in contrast, registration triggers severe restrictions on residency, work, and movement, as detailed above.

The Supreme Court has upheld occupational restrictions against Ex Post Facto Clause challenges, but only narrow restrictions affecting specific occupational categories. *See De Veau v Braisted*, 363 US 144, 160; 80 S Ct 1146; 4 L Ed 2d 1109 (1960) (upholding restriction on union membership for waterfront workers as a limited "regulation [of the] proper qualifications for a profession"); *Hawker v New York*, 170 US 189, 197-198; 18 S Ct 573; 42 L Ed 1002 (1898) (upholding restrictions on the practice of medicine). It has never upheld a sweeping restriction affecting all types of work (depending on location) and simultaneously also restricting residency and mere presence. In *Cummings*, the Court struck down occupational restrictions on Confederate sympathizers, recognizing that work restrictions may indeed be punitive in effect. 71 US at 286 ("If the legislature may punish a citizen, by deprivation of office or place, on the ground that his continuing to hold it would be dangerous to the State, then every punishment, by deprivation of political or civil rights, is taken out of the category of prohibited legislation. Congress and the State legislatures…[could then] pass retroactive laws at will."); *see Hawker*, 170 US at 198 (distinguishing *Cummings*).

Third, while the plaintiffs in *Smith* argued that the Internet dissemination of their records would likely lead to employment and housing disadvantages, the Court dismissed this argument:

> This is conjecture….The record in this case contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords… Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record.

Smith, 538 US at 100-01. Under Michigan's current registry scheme, in contrast, severe occupational and housing disadvantages *are* imposed on registrants—indeed, they are in substantial part *directly imposed* by the statutory restrictions, rather than being merely speculative consequences. This statute does not merely disseminate information that was "already a matter of public record"; it directly restricts where registrants can live, work, and move. Moreover, even setting aside the residency and movement restrictions, the registry imposes new and onerous burdens, including frequent in-person appearances. These burdens are particularly acute as applied to registrants such as Mr. Temelkoski, who did *not* have a "conviction" at all, much less one that is "already a matter of public record." Absent the registry, his dismissed case would have been sealed pursuant to HYTA. The *Smith* Court's logic simply does not apply here.

3. The Statute Serves the Traditional Purposes of Punishment.

The traditional aims of punishment—the third *Mendoza-Martinez* factor—include incapacitation, retribution, and specific and general deterrence, all of which are advanced by the Michigan restrictions. As discussed above, the statute imposes a range of severe restrictions and burdens on offenders, and these are triggered directly by the fact of criminal conviction, rather than by any separate finding of dangerousness. The deliberate

imposition of harms on individuals by the state, in direct response to conviction of a criminal offense, is traditionally the central characteristic of "punishment," meeting for example H.L.A. Hart's classic definition.[2] Because the restrictions are determined by the past offense, and not present dangerousness, they are in an important sense backward-looking, consistent with retributive theories of punishment. They likewise are likely to act as a general deterrent to other potential offenders. Indeed, the leading empirical study has concluded that registration requirements appear to have a general deterrent effect, but *not* to reduce crime by registrants themselves (their purported regulatory purpose). Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior*, 54 J L & Econ 161 (2011). This research had not yet been conducted when *Smith* was decided.

Meanwhile, the statute's purported regulatory purpose—to prevent recidivism—is itself also a traditional aim of punishment, which seeks to reduce recidivism through channels including incapacitation and specific deterrence. This statute seeks to

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[2] As Professor Carol Steiker has explained, "most discussions about the nature of punishment begin, even if they do not end," with Hart's five-part definition of the "standard" case of punishment:

> (i) It must involve pain or other consequences normally considered unpleasant.
>
> (ii) It must be for an offence against legal rules.
>
> (iii) It must be of an actual or supposed offender for his offence.
>
> (iv) It must be intentionally administered by human beings other than the offender.
>
> (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 Geo LJ 775, 800 (1997) (quoting Hart, *Punishment and Responsibility* 4-5 (1968)).

incapacitate sex offenders from committing certain sex crimes (by barring them from places where they might have access to children) and to specifically deter them by making it more likely that they will be caught if they commit crimes. Because the same interests can be simultaneously described as punitive and regulatory, the fact that the restrictions advance them may not be very helpful in disentangling whether the restrictions should count as punishment for the purpose of the Ex Post Facto Clause. In *Smith*, the Court acknowledged that the statute could serve the traditional punishment purpose of general deterrence, but found that this factor was not dispositive, given its holdings on the other *Mendoza-Martinez* factors. *Smith*, 538 US at 102. Here, however, those other factors tilt in *favor* of a finding of punitiveness.

4. The Michigan Statute Does Not Effectively Serve Its Purported Nonpunitive Purpose, and Is Excessive with Respect to that Purpose.

The final two *Mendoza-Martinez* factors considered in *Smith* are closely interrelated: whether the statute advances a legitimate nonpunitive purpose and whether it is excessive with respect to that purpose. Here, the statute seeks to serve the same basic purpose as the Alaska statute in *Smith*: preventing recidivism by registrants. This purpose is surely legitimate, and given *Smith*, we do not doubt that it can be characterized as nonpunitive or regulatory—even though, as noted above, it is also a traditional purpose of punishment.

However, strong evidence (unavailable when *Smith* was decided) now shows that the challenged restrictions fail to accomplish their regulatory purpose. The leading empirical study in the field finds that sex offender registration and notification

requirements actually appear to *increase* recidivism (likely by undermining offenders' ability to find housing and employment). *See* Prescott & Rockoff, *supra*. As the Sixth Circuit observed in *Does*, there is also no empirical evidence that residency restrictions reduce recidivism. *Does*, ___ F3d ___ (Docket No. 15-1546); slip op at 11-12.

Because the key inquiry in this case concerns whether the *effects* of the law are punitive rather than regulatory, empirical evidence as to what those effects actually are is important. In an "effects" inquiry (distinct from the question of punitive *intent*, *Smith*, 538 US at 92), the fact that a legislature may have intended the law to serve a regulatory purpose is not enough to sustain it. Empirical evidence may, over time, reveal that a law initially believed to be nonpunitive in effect should, in fact, be understood as punitive—and that is the case here. [3]

Moreover, having a nonpunitive purpose (even if it is indeed effectively accomplished) cannot be understood as sufficient, in and of itself, to defeat an Ex Post Facto Clause challenge; the *Mendoza-Martinez* factors must be considered in combination. This is especially so if (as here) the asserted nonpunitive purpose is prevention of recidivism and protection of public safety, because traditional criminal

[3] Empirical evidence also now demonstrates that the magnitude of the state's interest in reducing recidivism is less than had previously been believed when *Smith* was decided (although we do not doubt that it still remains a legitimate state interest). *See Smith*, 538 US at 103 (citing earlier studies for the proposition that the "risk of recidivism posed by sex offenders is 'frightening and high'"). For example, a Department of Justice study of the 9,691 sex offenders released in fifteen states since 1994 found that sex offender recidivism was only 5.3% in the critical window of three years after release. Langan, Schmitt, & Durose, *Recidivism of Sex Offenders Released from Prison in 1994*, Bureau of Justice Statistics (2003). This rate is significantly lower than recidivism rates for many other groups of criminal offenders.

punishment *routinely* and centrally seeks to serve those same purposes. For example, arguably the principal purpose of incarceration is to incapacitate offenders and thereby protect the community, and the historical punishment of banishment likewise seeks to protect the community by removing offenders. Yet no one could doubt that incarceration and banishment are "punishment." Here, the similarity of Michigan's restrictions to banishment, and the harshness of the disabilities it imposes, weighs heavily in favor of characterizing it as punishment, even if it also serves a regulatory objective.

In any event, the Michigan restrictions are also excessive with respect to their regulatory purpose, in ways that differ from the Alaska statute at issue in *Smith*. We have already detailed above the ways in which Michigan's legislative scheme is particularly harsh, including its restrictions on movement, residency, and work, the fees it imposes, and its many personal appearance requirements. These requirements are excessive. The fees and frequent personal appearance requirements bear no apparent relationship whatsoever to public safety at all. How, for example, could public safety be advanced by requiring a registrant to appear *in person* (and not merely call) whenever he creates a new login for some online function? These are simply gratuitous burdens.

The restrictions on movement, residency, and work likewise are far out of proportion to anything required to promote public safety—especially as applied to offenders like Mr. Temelkoski, who faced relatively minor charges that were dismissed decades ago, in his youth. While it may certainly be reasonable for a state to restrict some sex offenders' access to jobs and locations where children are present, here the restrictions are sweeping and not individualized; they do not merely apply to offenders

whose individual histories suggest that they pose a threat to children. In *Smith* and other cases, courts have upheld some registration requirements and other restrictions even though they similarly lacked individualized fact-finding. But this was because these requirements were deemed only minimally burdensome. The Supreme Court has made clear that when a state imposes greater burdens on individuals, its obligation to make sure those burdens are appropriately tailored grows. *Smith*, 538 US at 104 (distinguishing *Hendricks*, 521 US at 363).

We acknowledge that the plaintiffs bear the burden of providing the "clearest proof" that this statute is unconstitutional. *Id.* at 92. This standard, however, cannot mean that no proof suffices. Indeed, even by this standard, *Smith* itself was a difficult case, drawing dissents from three Justices and a concurrence from a fourth, Justice Souter, that emphasized the case's extremely close nature. *Smith*, 538 US at 110 (Souter, J., concurring). The Michigan statute is much harsher than the Alaska statute at issue in *Smith*, and much more analogous to traditional punishments; moreover, new empirical evidence demonstrates its failure to accomplish its regulatory purpose. The case is no longer close; the "clearest proof" standard is satisfied.

By holding Michigan's sex offender restrictions unconstitutional, the Sixth Circuit in *Does* joined a growing body of courts that have concluded that burdensome next-generation sex offender restrictions have crossed the line from regulatory to unconstitutionally punitive. *See, e.g., Doe v New Hampshire*, 167 NH 382; 111 A3d 1077, 1100-02 (2015) (holding that the sex offender "statute has changed dramatically . . . to the point where the punitive effects are no longer '*de minimis*'"); *Starkey v Oklahoma*

Dep't of Corrections, 2013 Okla 43; 305 P3d 1004, 1030 (2013) (holding the Oklahoma sex offender restrictions unconstitutional); *Doe v Dep't of Public Safety and Corr Servs*, 430 Md 535; 62 A3d 123, 143 (2013) ("The application of the statute has essentially the same effect upon Petitioner's life as placing him on probation and imposing the punishment of shaming for life, and is, thus, tantamount to imposing an additional sanction for Petitioner's crime.); *State v Williams*, 129 Ohio St 3d 344; 2011 Ohio 3374; 952 NE2d 1108, 1112-13 (2011) ("The statutory scheme has changed dramatically…[W]e conclude that imposing the current registration requirements on a sex offender whose crime was committed prior to the enactment of S.B. 10 is punitive."); *Wallace v Indiana*, 905 NE2d 371, 384 (Ind, 2009) ("Thus, the non-punitive purpose of the Act, although of unquestioned importance, does not serve to render as non-punitive a statute that is so broad and sweeping."); *State v Letalien*, 2009 Me 130; 985 A2d 4, 26 (2009) (holding that "the retroactive application of the lifetime registration requirement and quarterly in-person verification procedures of SORNA…is punitive"); *Com v Baker*, 295 SW3d 437, 447 (Ky, 2009) (holding that Kentucky's "residency restrictions are so punitive in effect as to negate any intention to deem them civil"); *Doe v Alaska*, 189 P3d 999, 1017 (Alas, 2008) (holding that a modified Alaska registration system now violated the Ex Post Facto Clause). This Court should do the same.

II. CONCLUSION

The collective effects of Michigan's collateral restrictions on sex offenders are so punitive that this Court should hold them unconstitutional violations of the Ex Post Facto Clause when retrospectively applied to the Plaintiffs.

Respectfully submitted,

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The Amici Curiae's Brief in Support of Defendant-Appellant was filed electronically using the Court's TrueFiling system on September 2, 2016, which will send copies by e-mail to all counsel of record.

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